No. 21633

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT E. GOLLAHER, etc.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee

APPELLANTS' OPENING BRIEF

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UNITED STATES COURT OF APPEALS
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vs.
U. S. A.,
Appellee

APPELLANTS' OPENING BRIEF

JURISDICTION

The jurisdiction of the District Court is founded on 18 U.S.C. 1001, 18 U.S.C. 1010 and 18 U.S.C. 371. The jurisdiction of this court is founded on 28 U.S.C. 1291. Judgment was entered December 12, 1966. R. 244. Notice of appeal was filed December 21, 1966. R. 246.

PROCEDURAL STATEMENT

In an indictment filed March 17, 1966, in the then U.S. District Court for the Southern District of California, Northern Division (Fresno), Robert E. Gollaher and Gollaher Construction, Inc., a corporation, appellants, (hereafter referred to as appellants) and Evelyn E. Barbee,

(hereafter referred to as Mrs. Barbee) were indicted in 15 counts on the following charges: conspiracy to make false statements to a government agency and to make false statements in FHA transactions -- violation of 18 U.S.C. 371; actual making of false statements to government agencies, the VA-violation of 18 U.S.C. 1001; and actual making of false statements in FHA transactions -- violation of 18 U.S.C. 1010. R. 1-20.

On April 4, 1966, Mrs. Barbee pleaded not guilty and leave was granted to appellants to file pretrial motions. R. 22. Motions were filed on May 2, 1966 by appellants to dismiss the indictment, for a bill of particulars, for discovery and inspection or in the alternative for continuance. R. 23-46.

Motion to dismiss the indictment was based on the following grounds:

1. Sufficient facts were not stated to constitute an offense against the United States. R. 23.

2. The indictment was a nullity because it was based in part on testimony of Robert E. Gollaher (hereafter referred to as Appellant Gollaher) who was called to testify before the grand jury investigating appellants, in violation of appellants' rights to counsel and against self-incrimination.

3. The indictment violated appellants' consti-

tutional rights under the 5th Amendment against double jeopardy and double punishment and under the 8th Amendment against cruel and unusual punishment in that appellants had already been punished for the same acts by reason of suspension from eligibility for home loan guarantees by the VA and the FHA.

4. The indictment violated appellants' constitutional rights under the Due Process Clause of the 5th Amendment to equal protection of the laws in that appellants were unfairly singled out for prosecution. R. 24.

The government filed a bill of particulars and opposition to motion of appellants for a bill of particulars and opposition to the motion to dismiss. R. 46, R. 55, R. 80.

On May 23, 1966, the various motions were argued before Judge M. D. Crocker and were submitted. R. 88. On May 27, 1966, the court denied the motions, and the case was set for trial on October 18, 1966. R. 89-96.

Motions were filed for leave to file Petition for Writ of Mandate in the Court of Appeals, but the motions were denied.

Mrs. Barbee, on October 13, 1966, withdrew

her former plea of not guilty and pleaded guilty to Count 2 of the indictment. Sentencing was ordered to be reset after appellants' trial concluded. R. 100.

On October 18, 1966, appellants pleaded not guilty to each of the counts. A jury was impanelled and presentation of evidence began. R. 101. Trial continued October 19, 20, 21, 26, 27, 28, 31 and November 1, 2, 3 and 4.

On October 31, 1966, a motion for judgment of acquittal as to the entire indictment was made by appellants pursuant to Rule 29 of the Federal Rules of Criminal Procedure. R. 108. The motion was denied. After both sides had rested and rebuttal testimony had been introduced, appellants again moved for judgment of acquittal. After argument, the motion was denied. R. 111.

The case was argued on November 4, 1966, the jury was instructed, and deliberations began at 3:30 p.m. At approximately midnight, the jury brought in verdicts of guilty against both appellants on Counts 1 through 6, and no verdicts on the remaining counts. R. 112-113.

Motions for judgment of acquittal notwithstanding the verdict and in the alternative for a new trial were made. R. 218-224; 234-241. The motions were denied. R. 242.

On December 12, 1966, Appellant Gollaher was sentenced to two years imprisonment on Counts 1 through 6 to run concurrently and was ordered to pay a fine of $5,000 each on Counts 1 through 6. One year of the sentence was suspended if the fine were paid in a year. Appellant corporation was ordered to pay a fine of $1,000 each on Counts 1 through 6. R 244.

Notice of appeal was filed December 21, 1966. R. 246.

FACTUAL STATEMENT OF THE CASE

A. The Prosecution Case

A narrative of the evidence from the view of the prosecution is as follows:

Appellants and Mrs. Barbee, along with unindicted co-conspirators, were charged with a conspiracy to make false statements to the federal government and its agencies in connection with home loan guarantees. (Ct. 1) Appellant Gollaher was president of appellant Gollaher Construction, Inc. (hereafter referred to as Appellant Corporation), a construction company building tract homes in the Fresno area. Several unindicted co-conspirators were the various homebuyers.

The alleged overt acts of the conspiracy paralleled

the substantive counts of the indictment. Count 2 charged that on or about June 18, 1962, appellants approached Lloyd V. McDaniel, brother-in-law of appellant Gollaher, and asked him to apply for an FHA loan for a home at 5144 East Lamona, Fresno, California. The deposit receipt (Ex. 8A3) used in connection with the McDaniel transaction stated that a $400.00 deposit had been made on the purchase price. McDaniel testified that he did not make the $400.00 down payment, but that appellant Gollaher furnished the money for it. Tr. 704:12-15; 18-19). McDaniel said he, as an office clerk and bookkeeper for appellants, made out a check for $803.49 and deposited it in his account, and he wrote a check for that amount, cashed it and took it to the title company for use in the escrow to purchase the home. Tr. 704:21-24.)

McDaniel testified that in July 1962 he had a conversation with appellant Gollaher regarding the home, after the FHA application had been made and Gollaher told him: "You kids don't want that house. Art Nichols (a salesman) has it resold." T. 706:10-19.

McDaniel figured in another home sale. He testified that appellant Gollaher asked him whether appellants could use McDaniel's VA home loan guarantee entitlement. He said Gollaher told him that Gollaher would assume full responsibility and would pay McDaniel $300.00 for use of

his VA entitlement. Tr. 707:12-16. This second home was located at 4226 North Pleasant Avenue, Fresno. Tr. 707: 24-708:1. McDaniel acknowledged that he signed VA form 26-1802 in which he stated that he intended to live in the house and that he had made a $25.00 deposit. Tr. 708:15-709:3. Ex.2D. McDaniel, when asked if he intended to occupy the house, answered: "No, sir, not when I first signed the papers, I didn't." Tr. 708:22-24.

He also testified that he did not make the $25.00 deposit as recited in form 26-1802 (Ex. 2D) and in the deposit receipt. Ex. 2E.

He testified that he never did reside in the house and never received the $300.00. T. 710:16-20. He further testified that the Government held him responsible for a deficiency in payments. He testified that it was "quite a shock" to him and that he borrowed $1070.00 from his credit union to pay the government. Tr. 711:20 to 712: 25.

McDaniel figured in another count of the indictment. He was the tenant of Richard Holt, an unindicted co-conspirator, involved in Counts 1 and 3. Tr. 461-462. Holt testified that in Spring 1962, appellant Gollaher talked to him, at a time when no one else was present, about his VA loan entitlement. The discussions were held over a period

of several weeks. Tr. 455:4-19. Gollaher asked to use Holt's VA entitlement to put another party in a house. Gollaher told Holt that it was commonly done and that he would pay Holt $300.00 for use of his VA rights. Tr. 456: 1-19. At the time (Spring of 1962) Gollaher owed Holt Lumber Co., operated by Richard Holt and his family, for materials. Tr. 456:20-22. Holt testified that Gollaher told him to say that the $300.00 was for materials purchased from Holt. Tr. 457:4-7.

Holt signed an application for a VA loan guarantee, (Ex 1B) but never intended to occupy it. Tr. 458: 19-21. He also signed a deposit receipt indicating he had made a $25.00 down payment, but he never made that payment. Tr. 459:1-11. Ex. 1C. Holt received $300.00, but he did not know from whom he received it. Tr. 459:12 to 460:7. The money was deposited in Holt's personal checking account, (Tr. 464:3-10) in October of 1962. Tr. 480:1. Holt said he originally believed he had placed the $300.00 check, made payable to his firm in the firm account, but later discovered he had endorsed the firm name on the check and put the money in his personal account. Tr. 480:17-481:1. Holt's wife testified that she never intended to move into the VA guaranteed home at 5155 East Lamona, but did not indicate whether appellants were aware of her intentions. Tr. 482:24 to 483:1.

On cross-examination, Holt testified that Gollaher had purchased $60,000 or more of lumber during the year in hundreds of transactions and that Gollaher always received a cash discount for prompt payment. Tr. 543:16-24. He admitted, however, that before the grand jury, he testified that Gollaher was as much as 90 days behind in payments and Holt was concerned about the account. Tr. 546:23 to 548:5.

Holt further admitted, when confronted with an invoice for $300.00, that a set of his firm's invoices had been tampered with so that the original (white copy) indicated a credit to a customer dated March 12, 1962 (Ex.K) while a carbon was dated September 5, 1962 and indicated a billing for $300.00 made out to Gollaher Construction Co. Tr. 552-556. Holt further admitted that he had told the grand jury that he had never submitted an invoice to appellants for $300.00. Tr. 556:17-21. Holt said he did not remember the circumstances of submitting the invoice and receiving the $300.00 check. T. 557:11-22; 561-562:11. Holt revealed that the value of the home he had purchased had increased in value. Tr. 563:11-21.

Mrs. Barbee, secretary-receptionist for appellants and a co-defendant, testified that she processed the Holt loan on orders of Charles Barboza, who called

her and said Holt would come over to complete a loan application on a home, and the company would find a buyer to take over the loan. Tr. 208:23-209:2; 210:3-211:23.

She said she did not remember discussing the Holt loan with appellant Gollaher. Tr. 225:17-4. The deposit receipt on the Holt loan (Ex.1C) bore Appellant Gollaher's name signed by Mrs. Barbee. The VA returned it and asked for Gollaher's signature, which he affixed to the document at the office of the lender. Tr. 224:13-22.

Mrs. Barbee said she made out the deposit receipt (Ex. 8A-3) and loan application on the McDaniel FHA home purchase and signed appellant Gollaher's name to the receipt, which indicated a $400.00 down payment. Tr. 237:22-238:5. She testified that the McDaniel loan was discussed at a sales meeting at which she, appellant Gollaher, Charles Barboza, Art Nichols, a salesman, and Robert Maus, real estate broker, were present in June of 1962. Mr. Nichols had sold a house to a Mr. Filanowski, who was unable to qualify for a loan, and appellant Gollaher and Mr. Barboza suggested that McDaniel's loan be placed on the property to be used for Mr. Filanowski. Tr. 251:1-20.

The McDaniel VA application was processed by Mrs. Barbee also. Tr. 227:10-22. That was in connection

with a proposed sale to a Mr. DeMatteo, who could not qualify for a loan. She said that the transaction was discussed at a sales meeting in July of 1962. Present were Mr. Barboza, Gollaher, Art Nichols and Mr. Maus. Tr. 252:13-22. Gollaher said to process McDaniel's VA eligibility for Mr. DeMatteo. Tr. 254:12-14.

As to the transactions that make up the remaining counts of the indictment on which the jury returned no verdict, but which may form part of the overt acts of the conspiracy count, Mrs. Barbee testified that she processed and in fact initiated them.

In connection with the home mentioned in Counts 7 and 8, a Mr. and Mrs. Showalter had purchased it, but could not qualify for a loan. Appellant Gollaher and Barboza suggested at a sales meeting in July or August of 1962 that Mrs. Showalter be contacted to see if some member of her family could qualify on her behalf. Tr. 258: 1-12. Mrs. Showalter testified that in April or May of 1962 she talked to Mrs. Barbee, who asked whether Mrs. Showalter knew of any veterans who have VA loan entitlements to let her use. Tr. 575:15-18. She gave the names of her brother, Melvin Bricker and of Marquis Pool. Mr. Bricker discussed the sale of rights with Mrs. Showalter and Mrs. Barbee. Tr. 575:19-23.

The latter told him he would get $300.00 and that everything was legal for use of his entitlement. Tr. 587:19-23. Mrs. Barbee was instrumental in processing the Vargas loan application (Count 11) knowing the Vargases would not occupy the property. Tr. 394:4-8; Tr. 778:2-18. One of the participants in this transaction was George Knapton a real estate broker, who sold homes at the tract, (Tr. 394:16-21) and in fact the record shows that the transfer of the property in Count 11 (1267 North Bailey Street, Fresno) was from George Knapton to the Vargases and that appellants were not involved. Ex. 5B.

Counts 12 through 15 dealt with a Robert and Carmen Porras. Once again Mrs. Barbee dealt with the veteran. T. 395:9-18 and T. 617:3-5. Mrs. Barbee told Porras he could get $300.00 for the use of his VA loan entitlement. T. 617:12-22. Count 12 deals with false statement on the VA application, (Ex. 6B) in connection with a house at 4258 North Woodson Avenue, Fresno, while Count 13 deals with a false statement of $25.00 deposit (Ex. 6C). The application for this particular home was rejected. Tr. 620:18-21. Thereafter Porras applied for a home loan at 4224 North Kavanaugh, and purportedly made false statements in the loan application, Ex. 7D. The indictment alleges offenses connected with a sale at

4224 North Woodson Ave. T. 19, 20 and therefore the evidence did not support the allegations of the indictment.

Charles Barboza, who was general manager for appellants, testified that his salary was $225.00 a week and that he was to receive a $100.00 bonus for each house he sold. Tr. 650:11-12. He said he discussed the Holt transaction with appellant Gollaher,(Tr. 652:5-19) between May and July of 1962. He testified that Gollaher told him to apply for a loan on a house in the name of Holt, and McDaniel, the brother-in-law, would live in it. Tr. 652:22 to 653:2. Barboza identified Ex. K, a check for $300.00 to Holt Lumber Co., as payment for the purchase of Holt's entitlement. T. 653:13-23. Barboza further testified that purchases of veterans' entitlements were discussed at sales meetings in detail. Tr. 665:19 to 666:12. When pressed for specifics of any fraudulent transaction, Barboza was unable to comply. See e.g., Tr. 678:6, 15-16, 21; 679:9-15, 22-24; 680:1-11, 17-22; 681:2-23, 682:1-3.

Mrs. Barbee testified that she had authority to sign Appellant Gollaher's name to various documents used in loan processing. (Susan Roberts of T. J. Bettes Company, a lender, testified that the practice with homebuilders was to have all documents necessary to complete a loan application signed in blank, and the lender would

fill in the blanks with information supplied. Tr. 143:19 to 144:14; 145:4-6.)

George Howarth of the legal division of the VA, San Francisco, loan guarantee division, testified that the VA in guaranteeing a home loan relies on the statement in the form 1802 of intention to move into a house. (Tr. 22:11-23:2) and on the deposit receipt. Tr. 27:5-14.

On cross-examination, he stated that a $25.00 down payment on a transaction would not influence the VA to accept or reject an applicant. Tr. 62:18 to 63:15. He further stated that a down payment was not required by the VA. Tr. 63:16-18.

B. The Defense Case

Appellants contended that since they had been suspended by the VA and FHA for the same alleged acts charged in the indictment and for that reason were unable to continue in the homebuilding business, they had already been punished for the same acts. A subsequent criminal trial constituted double punishment, and double jeopardy and cruel and unusual punishment. This argument was raised in the Motion to Dismiss the Indictment. At trial, the court would not permit introduction of evidence regarding the suspension and the denial of a

of a civil or administrative hearing to appellants. Tr. 960:3 to 961:22. An offer of proof was made. Tr. 967:24 to 969:19.

Further contentions were that neither appellant Gollaher nor the appellant corporation participated in any of the crimes alleged in the indictment. Appellant Gollaher was building tracts in other places other than the tracts involved in the home sales charged in the indictment. He was an officer of the San Joaquin Valley Homebuilders Assn., was active in the state Homebuilders Assn., and was a member of a state committee drafting a building code. Tr. 997:14 to 1000:6. All of this activity took him away from his office in Fresno for long periods of time and he left the day-to-day operations up to his staff, mainly Mrs. Barbee and Mr. Barboza.

The sales office where Mrs. Barbee worked was at the tract, while Gollaher's main office where he had his headquarters, was in another part of the city. Tr. 992:9-12 and 996:4-25.

All documents and checks were presigned because he was away so much. Tr. 1008:2-19; 1009:4-23; 1042:1-11.

Appellant Gollaher testified that he was in construction business since he was 17 years old. He served

in the Navy and was wounded in action during World War II. Tr. 986:14-987:2. During his career he had built some 10,000 homes with a total cost of more than $15,000,000. Tr. 989:16-17. Through the years he had dealt with both the VA and the FHA and his relationship was satisfactory. Tr. 990:8-15. Sometime in May of 1962, someone had started some rumors about him, and he asked the FHA to investigate, and the FHA advised him that his operations were proper and satisfactory. Tr. 1007:4-20.

About this time he had incurred the wrath of certain persons at the FHA because of personality conflicts.

Mrs. Barbee, Mr. Barboza, McDaniel and Holt were shown to have acted for their own purposes and benefits. Each was shown to have strong motives to lie and place blame for any irregularities on appellants. Mrs. Barbee, after being approached by the FBI, said she was not going to take any blame alone. Tr. 1194:21-23. Mrs. Barbee, who was an actual defendant, was the prime prosecution witness to incriminate appellants. Her sentencing was delayed until after trial of appellants, and her eventual sentence was suspended. Holt admitted on the stand that he falsified a company invoice and deposited a corporate check in his personal account.

In addition, none of the prosecution witnesses

gave specific and direct testimony. They were vague, general and conclusionary. For instance, Mrs. Barbee and Mr. Barboza testified that the Holt transaction (and others) were discussed at weekly sales meetings. Tr. 220: 10-13. The only disinterested witnesses were Robert Maus and John Mullen, (Tr. 1176:19 to 1178:12; 1053:11 to 1055:4) who were present throughout those meetings and denied that any mention of any illegal transaction regarding the sale of VA loan rights was made.

Appellant Gollaher testified that Gene Morgan and George Knapton, real estate brokers for him at various times, were close to Mrs. Barbee and that Morgan was fired for stealing down payments. Tr. 1010:1-19; 1012: 11-25.

Gollaher testified that his companies purchased almost $275,000 to $300,000 worth of lumber in 1962 and 1963 from Holt, that a discount was always allowed, and that the accounts were never in arrears. Tr. 1016:10-15; 1022:3-9.

C. Coercion of Government Witnesses

(1) Evelyn Barbee

The record shows that Evelyn Barbee, a co-defendant, was first contacted by the FBI on approximate-

October 20, 1964. T. 360:18-25. Mr. Emonts of the FBI telephoned her in November of 1964, and she refused to talk with him. T. 361:5-12; Mr. Greiner of the FBI contacted her in January 1965, but she did not talk with him. T. 361:13-25. She was asked to contact the United States Attorney's office, and she did not. T. 365:3-6.

Thereafter she was summoned before the grand jury on March 3, 1965. T. 366:6-7; 439:12-14. At her appearance before the grand jury, Mrs. Barbee first learned that she was a potential defendant, and was under suspicion for crime. T. 389:4-6. She was told by Asst. U.S. Atty. Mitchell while she was before the grand jury that any cooperation she gave would be made known to the court at the time she was sentenced. T.400:1-4.

At the grand jury session, Mitchell told her that the government wished to make it clear that any information she gave, any cooperation, whether it be cooperative government witness, after her case was disposed of, all aid she would give to the federal government will be made known to the court at the time of her sentencing. Mitchell closed that statement with: "Have I made myself clear?" T. 401:16 to 402:3. Mitchell called a recess and then, upon resumption of the grand jury hearing, he told Mrs. Barbee that he was not trying to twist her arm. T. 402:7-12. At the grand jury hearing, Mrs. Barbee gave

general testimony about appellants. At the close of the hearing, she was told that she would be called back the following week to give details unless she would talk with the FBI. Her grand jury testimony is Ex. 25.

Numerous conferences with the U.S. Attorney were held by Mrs. Barbee while the trial was in session. T. 448:6-450:4.

(2) Charles Barboza

Charles Barboza is a sickly man, suffering from diabetes. He was called before the grand jury on January 26, 1966. He denied all knowledge of wrongdoing in relation to the Gollaher organization. T 644:16-15:4 to 677:10. As that hearing closed, Mr. Miller who conducted the grand jury hearing said to Mr. Barboza: "Let me advise you that perjury before a federal grand jury is a criminal offense, punishable with a possible term of imprisonment of, I think, five years and/or a fine if a conviction and sentence erupt therefrom." T. 644:23 to 645:3. Barboza was further questioned at that session and denied any wrongdoing. T. 645:11-21; 678:22 to 677:10.

After the grand jury session Barboza had a conversation with Miller in Miller's office. T. 649:17-21. Ex. 59.

The next morning Barboza changed his story and inculpated Gollaher. Ex. 60.

(3) Lloyd McDaniel

Lloyd McDaniel was contacted by Mr. Emonts of the FBI in February of 1964. T. 7015:3-9; 800:9-14. In March he spent about an hour at the FBI office. Emonts took a statement from him, and McDaniel signed it. T. 722: 3-723:13. Later Emonts and another FBI agent came to the McDaniel home. T. 725:17-22. The FBI men stayed about 45 minutes and questioned McDaniel. T. 726:17:22. He did not have the benefit of counsel. T. 734:20 to 735:9.

McDaniel appeared before the grand jury in March of 1965. T. 716:8-19; 801:16-18. He said he lied at his first appearance. T. 716:20-23.

At the grand jury, an Assistant U.S. Attorney called him into a room and told him: "Mr. McDaniel, you are here as a witness defendant. It all depends on which way the grand jury wants to go." T. 729:12-20. He testified for about an hour. T. 730:7-8.

At the first hearing, McDaniel was asked whether he would answer questions or would invoke his privilege against self-incrimination. He had not consulted counsel. T. 803:11-25. McDaniel said he would "answer to the truth."

T. 804:11-12. He was told he could refuse to testify. T. 805:7-12. McDaniel testified he purchased the FHA and VA homes (T. 807:1 to 809:25) but did not move into the VA home because his wife did not want to. He said he made a $25.00 down payment on the VA home. T. 810:4-5. At one point McDaniel refused to answer a question re: the subject of a conversation he had, prior to his grand jury appearance, with Mrs. Barbee. T. 813: 19 to 814:6.

At that point, the Assistant U.S. Attorney threated to take McDaniel before a district judge for an order compelling him to answer on penalty of contempt. T. 814:8-12. McDaniel said that his reaction to the remark was: "I was real scared . . . . That shook me up real bad." T. 814:13-15.

McDaniel then answered the question, and said he told Mrs. Barbee: "Well, I am going to tell the truth and that's it." T. 815:17-22. Then Mr. Mitchell said to McDaniel: (T. 818:5-10)

"I think I would like to do this, Mr. McDaniel, I would like to take a 4 or 5 minute recess, with the permission of the foreman, and I would like you to go out into the witness room and think about this. I would like to remind you that we have had other witnesses before the grand jury . . . . ."

Then Mitchell said:

"No. 1, the facts that at the present time, you are at most a potential defendant and possible a cooperative government witness . . . . (T. 819:7-9).

"The grand jury, of course, is only interested in the truth in the matters it is investigating. I would like to tell you that I don't think you have been completely frank with us. I think there are some areas you are completely covering up and possibly concealing. I think there are other areas where you have possibly been untruthful. (T. 819:16-25)

"Now if I am wrong, I would like you to come back in here in 4 or 5 minutes and tell me about that." T. 820:5-10.

McDaniel said the procedure caused him to become upset, and he was scared. T. 821:5-8. When he returned to the grand jury room, he was frightened and scared. T. 821:22-25.

At the grand jury, Mitchell, then asked, whether there was anything in his testimony so far or his statement to the FBI that he wished to change. T. 822:22 to 823:2.

McDaniel told the grand jury and Mitchell that he had asked for counsel before he signed the statement for Mr. Emonts, but the agent asked him whether he had

ever been arrested before. T. 823:9-15. That statement by the FBI agent "scared" and "shook up" McDaniel because by using the expression "before" McDaniel assumed Emonts was going to arrest him then. T. 823:13 to 825:20; 826: 3-22.

McDaniel continued his testimony before the grand jury and did not testify to any improper activity by appellants. T. 828, 829, 830, 831, 832, 833.

Then the episode of the metal box started. T. 833. McDaniel indicated he had had cash in a metal box used for the downpayment on the FHA home. T. 833:1-8. The box was apparently kept in the basement of his parents' home. T. 833:9-14

Then, before the grand jury, Mitchell said to McDaniel:

"Is it your position then that any testimony you may give concerning this black box in your mother's house may tend to incriminate you personally and make you a defendant in the eyes of the grand jury? T. 834: 12-15.

"You have this right and this is an absolute constitutional right. If you so desire you may take the Fifth Amendment. This is a decision you will have to make yourself." T. 834:19-22.

"I would remind you that there is a perjury statute." T. 835:1-2.

"And I will tell you quite frankly that I don't think you have been honest with the grand jury." T. 835: 10-12.

Before the grand jury, McDaniel was questioned about the exact location of the metal box, (T. 836:17-22) and then the following discussion took place:

MITCHELL: "Do you have any objection to my stepping out of the grand jury room, and would you consent to this in writing, in having the FBI agent in Fresno going immediately to your house and get that black box at the present time." T. 837:5-9.

McDANIEL: "Well, thats unconstitutional, isn't it?" T. 837:12.

MITCHELL: "Giving consent to this, if you are telling the truth, there is no reason you shouldn't." T. 837:17-19.

"You can consent to this. If you are telling the truth, there is no reason you shouldn't; if you aren't, you should take the Fifth Amendment, because you perjured yourself." T. 838:1-5.

Mitchell further pressured McDaniel before the grand jury and the following colloquy took place:

MITCHELL: "Would you give permission for an agent of the Federal Bureau of Investigation to go to your house right now and check it out." T. 838:16-18.

McDANIEL: "Because it has my personal papers in there, I think we have a constitutional right to have a right to our papers." T. 838:21-23

MITCHELL: "You have an absolute right. I just want the agent to check and see if there is such a box there at the present time. T. 839;3-5

McDANIEL: "No, I don't want nobody to go in my home, my house." T. 839:9-10.

MITCHELL: "You won't give an agent of the FBI that permission then?" T. 839:12-13

McDANIEL: "No, sir." T. 839:14.

MITCHELL: "Suppose I call your wife and your wife find (sic) the box. I can make a phone call from the office. Would you be willing to have your wife deliver the box to an agent of the FBI? T. 839:17-20.

"He could wait outside your house." T. 839:25.

McDANIEL: "No." T. 840.2

Then Mitchell threatened to involve McDaniel's

parents who were elderly and sickly. The following transpired:

MITCHELL: "Has your mother seen (the box)?"

McDANIEL: "Yes."

MITCHELL: "She has. So if she were brought before the grand jury, she would be able to answer concerning that particular box and remembering, isn't that correct?"

McDANIEL: "I doubt if she would remember it. She is almost dead." Tr. 840:15-25

MITCHELL: "Is that the only reason? How about your father?" Will he remember?" T. 841:24-25

McDANIEL: My poor dad can't hardly get down the basement. He has a hard time of it, but he makes it." T. 842:4-5

Prior to his trial testimony, Assistant U.S. Attorney Miller told McDaniel that perjury was a serious crime. T. 848:1-2. Prior to the second grand jury appearance, McDaniel was told: "there was no criminal prosecution, if" he "gave truthful answers." T. 859:21-22

Finally, Mitchell threatened to call McDaniel's wife before the grand jury:

MITCHELL: "Now, Mr. McDaniel, do you have children? . . .

"I just wanted to check and see whether or not a subpena for your wife would in any way inconvenience you as far as children are concerned." T. 861:3-7.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the 4th, 5th, 6th and 8th Amendments to the Constitution of the United States.

The statutory provisions are 18 U.S.C. 1001 and 18 U.S.C. 3481.

All are set forth in relevant part in Appendix A.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in denying a motion to dismiss the indictment and in denying a motion for judgment of acquittal, which motions were based on the fact that Appellant Gollaher, when a potential defendant, was subpenaed before the federal grand jury, and compelled to testify without presence of counsel and without adequate warnings re: self-incrimination. R. 41-42; 94; 242.

2. The District Court erred in denying a motion to dismiss the indictment, which motion was based on the fact that appellants had already been punished by being forced out of business by two agencies of the government for the same alleged acts and transactions. R. 42-43; 94.

3. The District Court erred in denying a motion for judgment of acquittal or for a new trial, which motion was based on the fact that testimony of coerced witnesses was used to convict appellants. R. 219; 222; 242.

4. The District Court erred in overruling certain objections, i.e. objections to the introduction of evidence that some of the homes sales resulted in foreclosures and financial loss to the Government and to some homebuyers. T. 16: 588; 710-712; 1298 - (Objection made. R. 17).

5. The District erred in refusing to permit defense inspection of an FHA file on appellants and of grand jury testimony of George Knapton and Gene Morgan. T. 971-974; 635: 15-19; Exs. 36, 37 and 38.

6. The District Court erred in denying a motion to dismiss the indictment, which motion was based on the ground that a mis-statement of a $25.00 down

payment on a VA home loan application is not material fraud. R. 40-41; 94.

7. The District Court erred in denying a motion for a new trial, which motion was based on the ground that there was no evidence to support a conviction against appellant corporation. R. 219; 242.

8. The District Court erred in considering at the time of sentencing the fact that Appellant Gollaher took the stand to defend himself at trial and refused to make a statement incriminating appellants after conviction. R.*

9. The District Court erred in overruling objections to leading and prejudicially erroneous questions asked by the prosecutor regarding "false" statements. T. 202-208; 211-213. (Objection made T. 202-203).

QUESTIONS PRESENTED

1. Whether it is a violation of the 5th Amendment right against self-incrimination and the 6th Amendment right to counsel to subpena and interrogate before the grand jury, a potential defendant, upon whom suspic-

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* Page and line reference to be supplied.

ion has focused , without permitting or providing him counsel, and without warning him of his right to refuse to testify at all. Does such violation make the indictment a nullity and make the use of his grand jury testimony at trial reversible error?

2. Whether it is a violation of the 5th Amendment rights against double jeopardy and double punishment and 8th Amendment rights against cruel and unusual punishment for the Government to bring criminal charges against a building contractor, after two agencies of the Government have suspended the contractor from his right to conduct business and have forced him out of business for the same alleged acts and transactions, where the suspension has caused the contractor extensive financial loss, and where the two governmental agencies have refused to grant the contractor a hearing on the suspension on orders of the U.S. Attorney until after the criminal proceedings are over.

3. Whether it is a violation of due process of law under the 5th Amendment for the Government to bring criminal charges against a building contractor after two agencies of the Government have suspended the contractor from his right to conduct business for the same acts and transactions, where the suspensions were made without a hearing, and where the contractor re-

quested a hearing, but was refused a hearing on orders of the U.S. Attorney until after the criminal proceedings were concluded, where the result of denial of hearing was to allow the Government to deprive defendants from an opportunity to learn the witnesses' testimony before trial and give the Government an opportunity to coerce the witnesses into giving testimony favorable to the Government.

4. Whether appellants' rights under the 4th Amendment against illegal searches and seizures and the 5th Amendment due process were violated by introduction into evidence of testimony obtained from witnesses in violation of the witnesses' rights against self-incrimination and to assistance of counsel, and where the testimony was obtained from the witnesses through promises of leniency or threats of prosecution.

5. Whether it was improper for the Government to present evidence in a prosecution charging the making of false statements to the Government that financial loss was suffered by the Government and some homebuyers as a result of those alleged statements.

6. Whether it was error for the Government to refer at trial to the fact that one James Tripp was convicted of a similar offense for which appellants were on trial.

7. Whether the defense was deprived of an opportunity to present its case fully, where the court refused inspection of grand jury testimony of two men, not called as trial witnesses, and refused inspection of an FHA file concerning appellants.

8. Whether a mis-statement that a $25.00 down payment was made on purchase of a VA insured home is a material fraud under 18 U.S.C. 1001.

9. Whether the evidence is insufficient to support a conviction against a corporation which was not a party to any of the alleged illegal transactions.

10. Whether appellants' rights to defend themselves at trial (6th Amendment) and against self-incrimination (5th Amendment) were violated by the trial judge's consideration at time of sentence that Appellants stood trial, testified and after conviction refused to make incriminating statements.

11. Whether it was prejudicial misconduct on the part of the prosecutor to phrase his questions in such a way as to suggest that "false" statements were made to the Government.

SUMMARY OF ARGUMENT

Calling appellant Gollaher before the federal grand jury while he was a de facto defendant, nullified the entire proceedings. Failure to warn him that as a potential defendant he did not have to testify at all violated his rights under the 5th Amendment. Interrogating him before the grand jury without counsel present violated his rights under the 6th Amendment. Prejudice is shown by the fact that his testimony before the grand jury was used to impeach him at trial and was used as affirmative evidence.

Since appellants were suspended by the VA and FHA without an administrative hearing, they were punished by deprivation of livelihood, and therefore placing them on trial and sentencing them for the same acts and transactions for which they were suspended constitutes double jeopardy and double punishment in violation of the 5th Amendment, and cruel and unusual punishment in violation of the 8th Amendment.

The prosecution so pilloried and coerced its witnesses in violation of their constitutional rights that use of that testimony resulted in a conviction based on illegally-obtained evidence and thereby deprived appellants of their due process rights.

Further instances of prosecution misconduct were: the attempt of the prosecution to prove that the government and some of the homebuyers suffered monetary loss by virtue of the acts of appellants; questions of the prosecutor were phrased in an inflammatory and prejudicial manner by reference to "false" statements; and reference was made that one Jim Tripp had been convicted for making false statements to the FHA.

Refusal of the trial court to allow defense discovery of the contents of grand jury testimony of Gene Morgan and George Knapton and of an FHA file hampered appellants in their attempt to prepare and present their defense.

Fraud charged in Counts 1, 4 and 6 referring to $25.00 down payments in the deposit receipts was not material fraud and was not relied on by the government agency. No down payment is required by the VA, and the VA does not approve or disapprove of home loan guarantees for existence or lack of a $25.00 down payment.

No evidence connects appellant corporation with any of the transactions charged. Appellant corporation neither constructed nor sold the homes involved in this case.

Procedures following at sentencing were im-

proper because the court meted out a harsh sentence because appellant Gollaher would not confess to the crimes of which he was convicted, in violation of his 5th Amendment rights against self-incrimination. The harsh sentence was imposed because appellants stood trial and defended themselves rather than plead guilty.

ARGUMENT

1.

THE CONVICTION MUST BE REVERSED BECAUSE APPELLANT GOLLAHER WAS COMPELLED TO TESTIFY BEFORE THE GRAND JURY AFTER SUSPICION HAD ALREADY FOCUSED ON APPELLANTS.

This assignment of error has two facets: violation of 5th Amendment rights against self-incrimination and 6th Amendment rights to effective assistance of counsel.

When Gollaher was subpenaed before the federal grand jury, the government was already investigating him and the appellant corporation. He was told he was a potential defendant. An investigation had commenced in June of 1963. Appellants were the target of the investigations, and the prosecution had a then present intention to seek an indictment against appellants at the time of

that grand jury appearance.

Suspicion had certainly focused on appellants; they were defendants in a real sense, and the grand jury appearance was a means of eliciting a statement from appellant Gollaher which would have the effect of convicting appellants. The accusatory stage had been reached.

No police official in the United States could have forced Gollaher to give a statement, but the U.S. Attorney using the grand jury as his tool did in fact compel certain responses from Gollaher which were later used to impeach his trial testimony. Tr. 1081:4 to 1083:22; 1084-1085; 1135:16-25.

The position of appellants at that time was clear. They were in reality defendants, not mere witnesses. Not only did they have a right against self-incrimination; i.e. not to answer particular questions, but they had a more pervading right, a right not to take the stand at all.

Title 18 U.S.C., Sec. 3481 provides in relevant part:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person

charged shall, at his own request, be a competent witness. . . " June 25, 1948, c. 645, 62 Stat. 833.

To compel Gollaher by subpena to testify before the grand jury was a violation of constitutional rights. A defendant is not required to claim the privilege. The law grants him this protection which he may waive, but only where the waiver is intelligently made. Waiver of constitutional rights is never presumed.

In the past there has been some split of authority on the propriety of calling a potential defendant before the grand jury. (Annotation 38 ALR 225; cf. U.S. v. Edgerton (1897 D.C. Mont.) 80 F. 374 with U.S. v. Scully (2 Cir. 1955) 225 F. 2d 113 and U.S. v. Cleary (2d Cir. 1959) 265 F. 2d 459). However Escobedo v. Illinois and Miranda v. Arizona have settled the issue in favor of the rights of the defendant.

In Miranda v. Arizona 384 U.S. 436, at page 467, the Court said:

> "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of

action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of incustody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

* * *

"The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. (p. 468)

* * *

"The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the

individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system - that he is not in the presence of persons acting solely in his interest.

"The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." (p. 469)

Certainly the warnings required by Miranda were not afforded Gollaher.

It might be argued that the Gollaher interrogation before the grand jury was not incustody interrogation, but measured by the realities of the situation, was Gollaher free to disregard the subpena? Once before the grand jury could he refuse to answer all questions? The answer to both of these questions is: Had Gollaher refused to appear or answer questions he would have been cited for contempt. Suffice it to say in the words of *Miranda*, p. 477, Gollaher was "otherwise deprived of his freedom of action in [a] significant way." He was a captive witness.

The abuse of the practice followed here was pointed up in *Powell v. United States*, (D.C. Cir. 1955) 226 F. 2d 269, 274, where the court said:

> "No doubt it would be a boon to prosecutors if they could summon before a grand jury a person against whom an indictment is being sought and there interrogate him isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public. But there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure."

The serious question alluded to by the court has now been answered by *Escobedo* and *Miranda*.

The presumption of prejudice by denial of constitutional rights is clear in the further circumstance that Gollaher had no counsel before the grand jury. The government had counsel. See Canon 9, Canons of Ethics of the American Bar Assn. cited in Escobedo v. Illinois 378 U.S. 478, 487 ftn. 7

The quandary of a potential defendant subpenaed before the grand jury is described in a recent paper:

> "One of these abuses seems to be the widespread practice of subpoenaing a potential defendant to testify before the grand jury and denying him the right to counsel while he undergoes questioning in the secret atmosphere of the grand jury room. A potential defendant who is brought before the grand jury without an attorney at his side is almost helpless. He is faced with a barrage of questions, often improper in the normal judicial setting, thrown at him by a group of reasonably intelligent citizens excited at the prospect of playing both lawyer and detective. This torrent of interrogation is, of course, directed by a skilled prosecutor capable of utilizing the grand jury as a tool to obtain incriminating evidence from the mouth of a nervous witness. The upset

> and confused witness does not know whether to respond to the questions and risk having his answers used against him at a trial or claim the Fifth Amendment, creating suspicion in the eyes of the jurors and risking a contempt charge. In this atmosphere, the proceeding takes on the attributes of a Star Chamber.
>
> "There is no comparable institution in our entire society which sanctions secret interrogation of a person 'legally' denied access to counsel."

Meshbesher, Right to Counsel Before Grand Jury, 41 F.R.D. 189, 190.

It can be assumed that at best the assistant U.S. attorney interrogating Gollaher told him he could have counsel outside the grand jury room. That procedure places on a de facto defendant the burden of determining whether a particular question is possibly incriminating signalling the necessity to dash out of the room to consult counsel.

As pointed out by two former assistant U.S. attorneys:

> "Of course, counsel in advising his client how to react in the face of possible future interrogation can never anticipate every possible

> question and every conceivable accusation that may be put to his client. The argument, then, reduces itself to the proposition that not only should a defendant be made aware of his rights, but that he is entitled to be advised at each step of the interrogation concerning whether or not to respond and how to respond, i.e., the tactics of the defense."

Enker & Elsen, Counsel for the Suspect: Massiah v. U.S. and Escobedo v. Illinois, 49 Minn. L. Rev. 47,64; see also Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio State L.J. 449, 476-481, 486-487.

Certainly what happened at the grand jury hearing could "affect the whole trial."

Hamilton v. Alabama,
368 U.S. 52, 54.
White v. Maryland,
373 U.S. 59

Appellants no less than the government were entitled to the tools of combat, i.e. counsel, in the grand jury room.

> "The situation facing the witness before the grand jury, therefore - one in which he will have 'to shift for himself' - is fraught with peril, for

> 'it is now universally conceded that a witness may be impeached in any subsequent trial * * * by self-contradictory testimony given by him before the grand jury. Similarly, the admissions of a party made in testifying before the grand jury are admissible against him although he does not take the stand at the trial'.")

Meshbesher, supra, 41 F.R.D. at p. 191

The Court in Miranda makes particular mention of the need for counsel during interrogation, not merely before.

> "Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires."

Miranda v. Arizona, supra,
384 U.S. at p. 470.

The deprivation of appellants' constitutional rights necessitates reversal, particularly since improper questions asked before the grand jury were used as admissions and to impeach Gollaher at trial. (Tr. 1081:4 to 1083: 22; 1084; 1135: 16-25.)

PLACING APPELLANTS ON TRIAL AND SENTENCING THEM AFTER SUSPENSION BY THE FHA AND VA CONSTITUTES DOUBLE JEOPARDY, DOUBLE PUNISHMENT AND CRUEL AND UNUSUAL PUNISHMENT.

Appellants were and are building contractors in California. During the years from 1960 to 1964, they built homes in the area of Fresno, California, in low and moderate price ranges. Such homes could only be sold with home loan guaranties of the Veterans Administration, and of the Federal Housing Administration.

During the 1962-1963 period, as alleged in the Indictment, certain homes, built by petitioners, were allegedly sold to persons qualified under VA or FHA regulations to obtain loan guaranties.

Sometime in December 1964, appellants moved their place of business to the San Jose, California area, and began construction of a tract of homes. All preliminary plans and specifications were approved by the FHA. Model homes were built and a sales campaign was begun. The homes were in a price range where FHA and VA home loan guaranties were essential. Buyers could seldom make the necessary down payments to qualify for the so-called conventional loans from banks or savings and loan associations.

A tract of approximately 400 homes was contemplated and on completion of the tract and the sale of all homes, appellants estimated a profit of $1,800,000.00. Numerous contracts for labor and material, financing and sales were entered into by appellants. While construction of the tract was under way, appellants received word from the FHA that they were being suspended from eligibility to receive FHA benefits. Thereafter the FHA ban was lifted. Ex. U, R. Tr. 1076:2 - 1077:10.

In or about November of 1965, appellants applied for VA loan guaranties. On or about December 23, 1965, the VA sent appellants a letter stating that they would refuse to appraise the project, which meant that no VA loan guaranties could be had. R. 35-36.

Appellants then duly requested a hearing from the VA on the alleged charges, but were told that a hearing would not be held because of a communication by the United States Attorney not to hold a hearing until after criminal action was disposed of. A copy of that letter is Ex. T at trial. R. 1074:8-17.

The necessity for immediate relief was so urgent that within a few days after the hearing, because of failure to receive an administrative hearing, appellants were forced to sell their interests in the tract at a loss approaching $1,500,000, because of the suspension. R. 33-34.

This is not a case of distinct civil and criminal remedies being used against an alleged law violator. All of the retributive acts of the government partook of criminal penalties because of the active participation of the United States Attorney. By being placed on trial for the crimes alleged in the indictment, appellants are being subjected to double jeopardy and double punishment for the same alleged acts.

In re Nielsen (1889)
131 U. S. 176, 182-183, 185;
In re Snow (1887)
120 U.S. 275, 285-286;
Grafton v. U.S. (1907)
206 U.S. 333, 351-352.

Since appellants have been punished by deprivation of their means of livelihood, it is repugnant to due process of law to permit the same sovereignty to punish an accused twice for the same offense, and it constitutes cruel and unusual punishment under the Eighth Amendment as well.

Ex Parte Lange (1874)
85 U.S. (18 Wall.) 163, 170-178;
In re Bradley (1943)
318 U.S. 50;
Trop v. Dulles,
356 U.S. 86.

To deprive one of the means of his livelihood constitutes punishment according to two leading cases: Ex Parte Garland, 71 U.S. 333 and Cummings v. Missouri, 71 U.S. 277.

In the Garland case, an attorney moved for leave to practice as an attorney before the Court. It was required that beforehand he take an oath that he had not voluntarily borne arms against the United States during the Civil War. He received a presidential pardon and amnesty for any acts committed on the condition he take the oath. He could not properly take the oath. Garland argued a violation of the Fifth Amendment that no one shall be deprived of life, liberty or property without due process of law.

The Court, through Justice Field, held that the right to practice a profession is property, and stated at p. 370:

> ". . . exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."

He went on to say that the practice of a calling "is something more than a mere indulgence. It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency." p. 370.

The Cummings case involved a priest who refused to take the oath of loyalty. The Court said:

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment; the circumstances attending and the causes of the deprivation determining this fact. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, guardian, may also, and often has been, imposed as punishment.
>
> * * *
>
> "The theory upon which our political institutions rest is, that all men have certain inalienable rights--that among these are life, liberty and the pursuit of happiness. All avocations, all honors, all positions are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment and can be in no otherwise defined." p. 283.

That deprivation of livelihood represents penalty and punishment was re-affirmed by the Supreme Court in the recent case of Spevack v. Klein, 385 U.S. 511, 17 L. ed 2d 574, 577, 87 S. Ct. 625, 628.

USE OF TESTIMONY COERCED FROM PROSECUTION WITNESSES VIOLATED APPELLANTS' RIGHTS UNDER THE FOURTH AND FIFTH AMENDMENTS.

Appellants are not raising an issue of credibility which generally is in the realm of the trier of fact. The issue raised here concerns use of coerced and tainted evidence akin to use of a coerced confession and use of illegally obtained evidence.

Where the procurement of evidence has been by proved coercion violative of the constitutional rights of a <u>witness</u>, a serious question arises upon use of such evidence at the trial of a defendant.

<u>U.S. v. Wolfe</u> (7th Cir.)
307 F. 2d 798, 801.

See also: <u>U.S. v. Flynn</u>
130 F. Supp. 412, 416.
<u>Turner v. Pennsylvania</u>
338 U.S. 62, 656-66, 69 S.Ct 1352.
<u>Mesorosh v. U.S.</u>
352 U.S. 1, 77 S. Ct. 1

The testimony of Mrs. Barbee, Lloyd McDaniel and Charles Barboza on the face of the record was obtained through harrassment, violation of their rights

and intimidation by government agents. Use of such evidence to convict defendants was a violation of appellants' constitutional rights under the 4th and 5th Amendments.

Napue v. Illinois
360 U.S. 264, 270, 79 S.Ct.1173

The record does not indicate that any of the grand jury witnesses who were either co-defendants or co-conspirators, were warned of their right not to testify at all under 18 U.S.C. 3481. They were in fact cautioned that they were potential defendants. After threatening the witnesses with possible indictment, the U.S. attorney hammered away at the witnesses until they testified to his satisfaction.

As to Mrs. Barbee, the promises that her cooperation would be brought to the attention of the sentencing judge (As indeed it was, since she received a suspended sentence.) carried with it the converse: failure to cooperate would result in a heavy sentence. It must be recalled that Mrs. Barbee did not talk to the FBI on first contacts. It was not until after she appeared before the grand jury and heard the threats that she testified to the government's apparent satisfaction.

McDaniel testified in turnabout fashion before the grand jury after threats that his aged and sickly parents and his wife would be called before the grand jury. Barboza also testified in turnabout manner before the grand jury after a conference with Mr. Miller, assistant U.S. attorney. After his inconsistent testimony before the grand jury, Barboza could have been charged with perjury no matter how he testified. It was to his advantage, to avoid prosecution, to testify favorably to the government.

On the other hand, the record indicates that no one wanted to talk with appellants or their counsel.

This pattern of coercion must be viewed in connection with the request of the United States attorney that VA not grant defendants an administrative hearing prior to completion of the criminal aspects of the case. The hearing was denied in January of 1966, (Tr. 1074: 8-17; Tr. 967: 24 to 969:19) and Morgan and Knapton were called before the grand jury and Barboza as well, as the VA was denying appellants a civil hearing.

Denial of the administrative hearing on suspension put the government in the position of a lawbreaker, and in using the fruits of the denial of the administrative hearing at trial, the government deprived defendants of due process of law under the 5th Amendment.

By denying appellants a hearing, the government had the opportunity of coercing and preempting witnesses before the defense would have an opportunity to question those witnesses under oath.

In People v. Martin,

45 Cal. 2d 755, 290 Pac. 2d 855,

the California Supreme Court stated that a defendant may challenge deprivation of rights of third persons because "a limitation virtually invites law enforcement officers to violate the rights of third parties; and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them."

See also: McDonald v. U.S.

451, 456; 69 S. Ct 191, 193.

The purpose of excluding illegally obtained evidence is to "deter lawless enforcement of the law."

In addition to the episodes before the grand jury, there were numerous conferences various prosecution witnesses had with the prosecutor. Since none of the witnesses had counsel present, the atmosphere was inherently prejudicial under the rules of Miranda v. Arizona.

Once the government had conflicting statements under oath from McDaniel and Barboza, those two

witnesses were forced to testify as the government wished or incur the wrath of the government and the probability of prosecution for perjury. As McDaniel testified, Mr. Miller told him that if he testified to the "truth", he would not prosecute him for perjury. The inference is clear as to how McDaniel was expected to testify to avoid prosecution for perjury.

The illegally obtained testimony introduced at trial was no different from illegally obtained real evidence which is outlawed by the Constitution.

<u>Wong Sun v. U.S.</u>
371 U.S. 471, 488, 83 S. Ct. 407, 417.

As Justice Holmes stated, unlawfully obtained evidence should not be used at all.

<u>Silverthorne Lumber Co. v. U.S</u>.
251 U.S. 385, 392, 40 S. Ct. 182, 183.

4.

APPELLANTS WERE PREJUDICED BY INFLAMMATORY TESTIMONY ABOUT FINANCIAL LOSSES SUFFERED THROUGH FORECLOSURES.

Fraud was the charge. Although damage is not a necessary element of the offense, the prosecutor created a prejudicial atmosphere and inflamed the jury against appellants by eliciting testimony that various

homebuyers suffered losses because of the home loan apr-applications involved in this case.

The losses were gone into in detail during opening statement and testimony (Tr. 16:16-25; 710:21 to 712:2; 588:9-24) and were strenuously argued in summation by the prosecutor. Tr. 1298:14-20.

In a case charging the making of false statements to the FHA or any government agency, for the purpose of obtaining favorable action, financial loss is not a necessary element of the crime.

Morgan v. U.S. (9th Cir. 1962)
301 F. 2d 272, 275.
U.S. v. Myers (DC Cal. 1955)
131 F. Supp. 525, 531.
U.S. v. Hawkins (6th Cir. 1961)
295 F. 2d 837, 839.
Cf. U.S. v. Thompson (1966)
366 F. 2d 167, 171

If the government does not have to prove loss to make out its case, then it should not attempt to prove it in any event. The sauce should be the same for both.

Evidence showing that financial losses were sustained either by the government or by individuals

should have been excluded.

<u>Ross v. U.S.</u> (6th Cir. 1950)
180 F. 2d 160,165.

The only purpose of alluding to such facts was to prejudice the jury against appellants.

5.

THE PROSECUTOR WAS GUILTY OF MISCONDUCT IN PHRASING QUESTIONS IN A PREJUDICIAL MANNER AND IN MAKING REFERENCE TO THE CONVICTION OF JAMES TRIPP.

The assistant U.S. attorney trying the case prejudiced appellants in the eyes of the jury by constant phrasing of questions (on direct examination of his own witnesses) in an argumentative fashion. The phrasing complained of referred to statements made to government agencies as "false" statements, when this was the very issue the jury was to decide.

This was the continuous practice of the prosecutor. A few examples follow:

> "During the course of the time that you were working for the Gollaher Company did there come a time that you were aware of a practice whereby <u>false statements</u> were being submitted to the Veterans Administration? Tr. 202:14-17 (Emphasis added)

> "How did you become aware of these false practices?" Tr. 204:10 (Emphasis added)
>
> "Did there come a time when you yourself participated in the presentation and preparation of certain false documents which you knew were going to be submitted to the FHA and the VA?" Tr. 205: 19-22 (Emphasis added)

Other examples are found in the record at Tr. 206:18; 207:9 and 12; 212:21; 213:6, 16 and 24; 215:3. At one point the court fell into the same error. Tr. 208:19; 213:8.

Objection was made to this practice without success. Tr. 202:18-20; 203:3-5.

The questions were in effect loaded, assumed something not in evidence and by repetition had a hypnotizing effect on the jurors.

The question regarding the conviction of James Tripp for FHA violations (Case No. 20535, pending in the Court of Appeals for the 9th Circuit) could only have been asked for the purpose of prejudicing the appellants. It served no legitimate evidentiary purpose. Objection was made, and the jury was instructed to disregard, but the damage was done and could not be repaired. Tr. 1080; 17-19; 1080:20 to 1081:2

It is possible for counsel to commit prejudicial error by his method of direct and cross-examination of witnesses.

People v. Ozuna,
213 Cal. App. 2d 338, 28 Cal. Rptr. 663.

People v. Perez,
58 Cal. 2d 229, 241; 23 Cal. Rptr. 569, 373 Pac. 2d 617.

Dastigar v. Dastigar,
109 Cal. App. 2d 809, 814; 241 Pac. 2d 656.

People v. Arnold,
199 Cal. 471, 494; 250 Pac. 182.

6.

APPELLANTS WERE DEPRIVED OF THE RIGHT OF PRESENTING THEIR DEFENSE BECAUSE THE COURT WOULD NOT PERMIT INSPECTION OF THE MORGAN AND KNAPTON GRAND JURY TRANSCRIPTS AND THE FHA FILE.

a. Knapton and Morgan Grand Jury Testimony

George Knapton and Gene Morgan, former real estate brokers on the housing tract, were called before the grand jury, but were not subpenaed to testify at trial by the prosecution. Since the government did not call Knapton nor Morgan, there is reason to believe that

Knapton and Morgan could not aid the government's case, and by implication their testimony might have helped the defense case. However, the defense, knowing that the government had sworn testimony of the men, could not risk calling Knapton and Morgan.

Not having knowledge of the grand jury testimony of the men, (Ex. 91 id (sealed)) the defense could not risk calling them as defense witnesses for fear the men might be impeached by their grand jury testimony. In that sense Knapton and Morgan were not "available" as witnesses for the defense. By not allowing defense discovery of the grand jury testimony of the two men, the court deprived the defense of possibly helpful witnesses.

<u>Brady v. Maryland</u>,
373 U.S. 83, 86; 83 S. Ct. 1194, 1196.

In <u>Dennis v. U.S.</u>, 384 U.S. 855, 873-874; 86 S. Ct. 1840, the Court said:

> "A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. See, e.g., <u>United States v. Bufalino</u>, 285 F. 2d 408, 417-418 (CA 2d Cir. 1960). Under these circumstances, it is especially important that the defense, the judge and the jury should

> have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations."
>
> Dennis v. U.S.
>
> 384 U.S. 855, 873; 86 S. Ct. 1840.

b. The Intra-Agency Communications

Although the government is plaintiff in this case, the FHA was one of the complaining witnesses, and the motive, bias or prejudices of the agency or its employees with respect to appellants was a matter of concern in this proceeding. The intra-agency communications in the FHA file might have shed light on motive, bias or prejudice, in other words, the attitude of the FHA in pursuing this prosecution.

The trial court cut off the defense right to pursue the question of credibility and motive of the FHA employees, who caused the prosecution to be initiated. The court, instead of reviewing the file itself, asked the prosecutor to look through the file and determine what should be made available to the defense.

The sealed documents extracted from the file are in Ex. 38 for id.

As the Court said in Dennis, p. 875:

> "The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

In note 20, of page 873, 384 U.S., the Court cites Alford v. U.S., 282 U.S. 687, where the Court reversed a trial court's ruling which deprived defense counsel of an opportunity to inquire into the background of a government witness.

The prosecution may not deny the defense access to evidence which may be helpful to its case, even though the evidence may be relevant only to the credibility of a witness.

Giles v. Maryland,
386 U.S. 66,70; 17 L. ed 2d 737, 744;
87 S. Ct. 793, 795.

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICTS ON COUNTS 2, 3, 4, 5, 6, AS TO APPELLANT GOLLAHER AND ON ALL COUNTS AS TO APPELLANT CORPORATION.

One of the elementary requirements of proving fraud is a showing that the fraud was material and of a nature that it would be relied upon by a governmental agency.

<u>Gonzales v. U.S.</u> (10th Cir.)
286 F. 2d 118, 122.
<u>Brandow v. U.S</u>. (9th Cir. 1959)
268 F. 2d 559, 565
<u>U.S. v. Breithauer</u> (D.C. Missouri, 1963)
214 F. Supp. 820, 821.

Counts 4 and 6 charge false statements with reference to the $25.00 down payments recorded in deposit receipts. Mr. Howarth, counsel for the VA, testified that no home loan was approved or rejected for existence or lack of a $25.00 down payment. In fact, the VA does not require a down payment.

The inclusion of the $25.00 specification in the other counts, 1 and 5, dealing the VA application form, so prejudiced appellants on those counts that those counts should be reversed as well.

Count 2 is not supported by evidence of fraud because appellant Gollaher gave McDaniel the down payment as a wedding gift. McDaniel testified that Gollaher gave him the money.

There is no evidence whatsoever that appellant corporation was involved in any of the transactions charged. Tr. 1084: 22-24; 1085: 4-10 The prosecutor attempted to prove there was a parent-subsidiary relationship between appellant corporation and the corporation which was involved in the transaction. The evidence was that each corporation was a separate entity. A parent corporation must own at least a majority of the stock of a subsidiary corporation.

> See definition of "subsidiary corporation" in Black's Law Dictionary.

8.

THE SENTENCING PROCEDURE VIOLATED APPELLANTS RIGHT TO A JURY TRIAL AND AGAINST SELF-INCRIMINATION.

At the time of sentencing, the trial judge rebuked appellant Gollaher for his failure to confess to the crimes of which he was convicted and took this failure into consideration in setting sentence. Allusion was also made to the fact that Gollaher took the witness stand to defend himself.

It was pointed out to the Court that Gollaher

was advised by counsel not to make any statements of admissions regarding the crimes charged since the judgments of conviction were not final. Other proceedings were still open to appellants, including a Motion for New Trial.*

To compel Gollaher to confess to crimes under pain of a harsher sentence violated appellants' rights.

Thomas v. U.S. (5th Cir. 1966) 368 F. 2d 941, gives a clear exposition of the problems and issues.

In that case the trial judge said:

THE COURT: * * *

"If you will come clean and make a clean breast of this thing for once and for all, the court will take that into account in the length of sentence to be imposed. If you persist, however, in your denial, as you did a moment ago, that you participated in this robbery, the court also must take that into account.

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* Because of delay of the court reporter in preparing the transcript, the page and line references to the record are not available. Appellants will supply the record references by letter or in a closing brief.

Now which will it be?

* * *

THE DEFENDANT: I am speaking for myself that I am innocent." p. 944

The appellate court said:

"In the case of United States v. Wiley (278 F. 2500) . . ., Judge Schnackenberg concluded the opinion of the Seventh Circuit as follows:

> "' Our part in the administration of federal justice requires that we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his effort proves unsuccessful. It is evident that the punishment imposed by the district court on Wiley was in part for the fact that he had availed himself of his right to a trial, and only in part for the crime for which he was indicted.
>
> "' For these reasons we set aside the three years' sentence imposed and re-imposed by the district court on Wiley and we remand this case to that court for a proper sentence not inconsistent with the views herein expressed.'"

* * *

"The language of Judge Weinfeld in United States v. Tateo, S.D.N.Y. 1963, 214 F. Supp. 560, 567, is peculiarly apropos:

> "'No matter how heinous the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, a defendant's right to continue with his trial may not be violated. His constitutional right to require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty - that if he persists in the assertion of his right and is found guilty, he faces, in view of the Trial Court's announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term. To impose upon a defendant such alternatives amounts to coercion as a matter of law.'

"It must be remembered that, at the time of his allocution, Thomas had not been finally and irrevocably adjudged guilty. Still open to him were the processes of motion for new trial (including the

opportunity to discover new evidence), appeal, petition for certirari, and collateral attack. Indeed, appeal is now an integral part of the trial system for finally adjudicating the guilt or innocence of a defendant.

"The two 'ifs' which the district court presented to Thomas placed him in a terrible dilemma. If he chose the first 'if', he would elect to forego all of the above-noted post-conviction remedies and to confess to the crime of perjury, however remote his prosecution for perjury might seem. Moreover, he would abandon the right guaranteed by the Fifth Amendment to choose not to be a witness against himself, not only as to the crime of which he had been convicted, but also as to the crime of perjury. His choice of the second 'if' was made after the warning that the sentence to be imposed would be for a longer term than would be imposed if he confessed. From the record, it is clear that an ultimatum of a type which we cannot ignore or approve confronted Thomas. Truly, the district court put Thomas between the devil and the deep blue sea." P. 945

The sentencing procedure was improper.

CONCLUSION

For the reasons hereinabove stated, the judgments must be reversed.

Respectfully submitted,

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APPENDIX A

Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .

Amendment V

. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . .; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence.

Amendment VIII

. . . nor cruel and unusual punishments inflicted.

APPENDIX A (Continued)

Title 18 U.S.C. Sec. 3481

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. . . ."

(June 25, 1948, c. 645, 62 Stat. 833)

CERTIFICATE AS TO BRIEF

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Earl Klein
Attorney